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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 996

TOM HARLING,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, YOLO COUNTY, STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

Petitioner seeks a writ of certiorari to review the judgment of the Superior Court, Yolo County, State of California, affirming a judgment of conviction of the Justice Court, Woodland Judicial District, entered in the above entitled case on November 29, 1965. That opinion which is unreported is set forth in Appendix A hereto.

JURISDICTIONAL STATEMENT

Jurisdiction for the present petition for certiorari is sought pursuant to the provisions of Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Was petitioner's right to cross examine the complaining witness unconstitutionally abridged?

2. Was petitiones deprived of due process of law by the introduction into evidence of his acts of prior intercourse with the complaining witness?

STATUTES INVOLVED

The pertinent statutes and constitutional provisions are set forth in Appendix B attached hereto.

STATEMENT

Statement of the Case

On May 21, 1965, in the Justice Court of the Woodland Judicial District, County of Yolo, State of California, the petitioner, who was represented by counsel, was found guilty of a violation of section 270 of the California Penal Code. On May 21, 1965, judgment was entered. On appeal to the Appellate Department of the Superior Court of the State of California, in and for the County of Yolo, the Superior Court affirmed the judgment.

Petitioner did not apply for certification of his case to the District Court of Appeal as provided for under Rule 63 of the California Rules of Court.

Statement of the Facts

On or about October 22, 1964, one Helen Monarrez caused a complaint to be filed against petitioner alleg-

ing that said petitioner was the father of her unborn child and that petitioner had wilfully and unlawfully failed to furnish medical attendance to herself and the unborn child. (Petition for a Writ of Certiorari, Appendix IV.)

Trial was commenced on or about May 21, 1965. At trial, it was adduced that Helen Monarrez and petitioner had first engaged in an act of sexual relations during the Yolo County Fair in 1963 (Settled Statement of Facts, page 32, attached hereto as Appendix C). After that, petitioner and Helen Monarrez engaged in numerous acts of sexual relations from January of 1964 to March 28, 1964 (Appendix C, pages 33, 34). During this period of time, Helen Monarrez became pregnant by petitioner. The child was born on November 7, 1964 (Appendix C, page 38). Helen Monarrez testified that petitioner had failed to provide any food, clothing, shelter, or medical attendance, and that he had not paid her any money (Appendix C, page 32).

Petitioner admitted engaging in sexual relations with Helen Monarrez but denied paternity (Appendix C, page 39).

The jury apparently resolved the question of paternity adversely to petitioner and found him guilty of "Failure to Provide", a violation of Section 270 of the California Penal Code, a misdemeanor (Appendix B) as charged.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION IN THAT PETITIONER HAS NOT PRESENTED HIS CONTENTIONS TO THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD

The jurisdictional statute permitting this court to review state court cases by certiorari relates only to final judgments and decrees rendered "by the highest court of a State in which a decision could be had" (28 U.S.C. 1257).

Petitioner was convicted of "Failure to Provide" in the Justice Court, Woodland Judicial District, State of California. He appealed this decision to the Appellate Department of the Superior Court, Yolo County, State of California. That court affirmed the decision. Petitioner did not seek certification as provided for by Rule 63,[1] California Rules of Court, to the District Court of Appeal. Therefore, he has not obtained a final judgment "by the highest court of a State in which a decision could be had" (28 U.S.C. 1257).

While the cases of *Talley* v. *California*, 362 U.S. 60; *Edwards* v. *California*, 314 U.S. 160; and *Robinson* v. *California*, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417, affirmatively state that the Appellate Department of the Superior Court was the highest court available to the petitioner in those cases, it should be noted that these cases were decided before

[1] See Appendix B.

the enactment of Rule 63, California Rules of Court, in January 1962 (Calif. Pen. Code § 1471).

Respondent submits that the judgment of the Appellate Department of the Superior Court, Yolo County, State of California, affirming the judgment of the Justice Court, Woodland Judicial District, is not a judgment of the highest court of the state in which a decision of the case could be had because state procedure provides for discretionary review of that appellate court's judgment in the District Court of Appeal. Such discretionary review was not applied for.

II. PETITIONER'S RIGHT TO CROSS-EXAMINE THE COMPLAINING WITNESS WAS NOT UNCONSTITUTIONALLY ABRIDGED

Petitioner contends that the trial court restricted cross-examination of the complaining witness, Helen Monarrez, thus violating his right to confront witnesses under the Sixth and Fourteenth Amendments.

This is not a correct statement of the record in this matter.

The record reflects that the court limited evidence of sexual relations with Miss Monarrez to the period between January 1, 1964 and March 31, 1964 (the period of possible conception). The attorney for petitioner was limited to making inquiry concerning other sexual activities on the part of Miss Monarrez unless he was prepared to prove by way of impeaching evidence in the event of a denial that she did in fact have relations during the period of possible conception

(Appendix C, pages 34, 35, 36). Petitioner made no offer of proof.

The record further reflects that petitioner did extensively cross examine Miss Monarrez as to her activities on February 18, 1964, and as to whether she loved petitioner and whether they had discussed marriage (Appendix C, page 37). Under cross-examination, Miss Monarrez denied telling one LeRoy Bailey on March 22, 1965, that "I would marry Tom if he came back to me. Tom is a good lover and good in bed" (Appendix C, page 37). Petitioner was also allowed to cross examine Miss Monarrez as to the number of boys she had been dating (Appendix C, page 37).

As was stated in *People* v. *Ashcraft*, 138 Cal.App.2d 820, 827, 292 P.2d 676:

> "In the exercise of a sound discretion, the trial judge may determine the extent of the cross-examination. (*People* v. *Serpa,* 67 Cal.App.2d 327, 332 (154 P.2d 6); *People* v. *Corlett,* 67 Cal.App.2d 33, 57 (153 P.2d 595, 564 (sic)).) . . ."

The federal rule which is comparable is set forth in the case of *United States* v. *Bender,* 218 F.2d 869, wherein the court stated at page 873:

> "The extent of cross-examination is a matter within the discretion of the trial judge and this court will review the exercise of that discretion only to determine whether or not it has been abused. (Citations)"

Again at page 874 the court stated:

> "The trial judge's duty to see that the evidence is presented to the jury in as orderly and understandable a manner as possible requires that he have broad discretion in such matters. The defendant gave no definite reasons for his attempted examinations. He made no offers of proof. In each case he merely said that he thought the questions were proper and in each case the questions sought information on matters not raised on direct examination. We find in this record no abuse of discretion on the part of the trial judge in refusing to permit the witnesses to answer these questions."

See also: *Alford* v. *United States,* 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; *Shama* v. *United States,* 94 F.2d 1; *Rea* v. *Missouri,* 17 Wall. 532, 84 U.S. 532, 21 L.Ed. 707.

The trial judge did not abuse his discretion in this case. Petitioner, by attempting to cross-examine Miss Monarrez as to prior unchastity at a time when conception could not have possibly taken place appears to have elected to try the case on the basis of "when you have no case, intimate misconduct on the part of the witnesses and *try them*—not the case." The court properly restricted petitioner in this regard. Certainly, there is nothing in the record before the court to show that the court in any way prohibited legitimate cross-examination of Miss Monarrez.

This is not a situation such as was present in the case of *Pointer* v. *Texas,* 380 U.S. 400, 13 L.Ed.2d 923,

85 S.Ct. 1065, where this Court held that the constitutional right of an accused to be confronted with the witnesses against him was denied where, at a state criminal trial the transcript of a witness' testimony given at the preliminary hearing was admitted as evidence, and this testimony was taken at a time and under circumstances affording the accused no adequate opportunity to cross-examine the witness through counsel.

In the case at bar, petitioner was represented by counsel. The complaining witness was present in court. The attorney for petitioner was allowed to cross-examine the complaining witness quite extensively. The only limitation the trial court imposed was that his questioning be relevant and material. Most certainly, the limitation did not amount to a denial of petitioner's right of confrontation.

The case of *Smith* v. *United States,* 331 F.2d 265, *cert. denied* 85 S.Ct. 49, 379 U.S. 824, 13 L.Ed.2d 34, *rehearing denied* 85 S.Ct. 321, 379 U.S. 940, 13 L.Ed.2d 350, cited by petitioner has no application to the case at bar.

In *Smith* v. *United States, supra,* the court held that the defendant was not prejudiced where a government witness repeatedly invoked the privilege against self-incrimination thereby denying defendant the opportunity of cross-examination.

In the case at bar, the complaining witness invoked no privilege against self-incrimination. The trial court

permitted all legitimate cross-examination. Petitioner's contention that the trial court restricted cross-examination of the complaining witness, thus violating his right to confront witnesses under the Sixth and Fourteenth Amendments, is unsupported by the record and patently without merit.

III. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS BY THE INTRODUCTION INTO EVIDENCE OF HIS ACTS OF PRIOR INTERCOURSE WITH HELEN MONARREZ

Petitioner contends that he was deprived of due process in that the prosecution was allowed to introduce evidence of his prior acts of intercourse with the complaining witness as tending to show the probability of paternity. Petitioner contends that he should be allowed to show acts of prior intercourse of the complaining witness with other individuals at a time before the possibility of conception to show the same probability.

This contention was answered by the superior court sitting as an appellate court as follows:

> "It appears that the evidence complained of was properly admissible as having a bearing on and tending to prove the commission of the crime charged against defendant. An essential element here, of course, is paternity. Certainly, evidence of sexual intercourse tends to show paternity and evidence of intercourse by Miss Monarrez and defendant prior to the period concerned here

(within the not remote past) tended to substantiate the occurrence of intercourse by them at the time of claimed conception. Evidence of previous intercourse is competent to show the probability of the particular act having occured (sic). *(Berry* v. *Chaplin*, 74 Cal.App. (2) 652; *People* v. *Brazil*, 112 Cal.App. 326). . . ." (Appendix A, page 17.)

"The cases clearly establish that it is improper to show intercourse of the mother with other men at times other than at or about the time of conception. (8 Cal.Jur. (2d) 252). . . ." (Appendix A, page 18.)

The applicable federal law has been set forth in the case of *Thomas* v. *United States,* 121 F.2d 905, at page 909 wherein the court stated:

"It is next contended that the court erred in excluding from evidence the statement of a witness, called on behalf of appellant, to the effect that the witness had had sexual intercourse with the mother of the child on many occasions prior to July, 1937. The statement was clearly irrelevant. In a proceeding of this nature, the sole issue is the paternity of the illegitimate child, and the chastity of the mother is immaterial. 'Lewd conduct of the complainant is no defense, unless it tends to show that another than defendant is, or may be, the father of the child.' Hence, evidence that the mother had intercourse with another man at a period of time which, in the course of nature, could not result in the conception complained of, is not relevant to the inquiry and is, therefore inadmissible. . . ."

There is no question but that the material sought to be introduced by petitioner pertaining to the prior unchastity of Helen Monarrez was properly excluded.

The above argument presented by the petitioner does not show any conduct on the part of the court which was such as to deprive the accused of some right or immunity secured to him by the United States Constitution. Indeed, this should not even constitute prejudicial or any error, but even if there were error, it did not amount to a deprivation of a constitutional right amounting to a denial of the essence of a fair trial. The admission or exclusion of evidence in this case does not present a federal question. (*Price* v. *Johnston,* 125 F.2d 806, *cert. denied* 316 U.S. 677, 62 S.Ct. 1106, 86 L.Ed. 1750; *Judy* v. *Pepersack,* 284 F.2d 443 *cert. denied* 81 S.Ct. 1667, 366 U.S. 939, 6 L.Ed.2d 850.)

CONCLUSION

The record in this matter discloses that the trial court did not restrict petitioner's right to cross-examine the complaining witness to the point where his constitutional rights were abridged. Nor was petitioner deprived of due process by the exclusion of certain irrelevant evidence at trial.

It is submitted that petitioner was fully accorded his rights as guaranteed under the United States Constitution, both at trial and on appeal.

It is therefore respectfully submitted that the petition for certiorari presents no substantial federal question and should be denied.

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF YOLO

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,* vs. THOMAS HARLING, *Defendant.*	No. 2997 OPINION AND DECISION ON APPEAL

Hearing of the Appeal from Woodland Judicial District in the above entitled matter was held on August 13, 1965, and submitted to the Court. The Court has considered all the record, including the various briefs of the parties.

In the following opinion the Court will give consideration to all the grounds and points raised by defendant in his appeal. It finds that none of the *Grounds* specified in the Statement of Appeal are sufficient and that the judgment of the lower court must be affirmed.

Hereinafter the Court considers the briefs and arguments and specified grounds set up by defendant by treating, in turn, each of the specifications of alleged error set forth by defendant as "Contentions" at page 11, line 20, through page 14, line 1, of defendant's *Statement on Appeal.* Each is discussed under the number given it by defendant; i.e., Contention I,

Contention II, etc., and in each instance defendant's contention is set forth.

I.

DEFENDANT'S CONTENTION I: THE COURT ERRED IN ALLOWING HELEN MONARREZ TO REMAIN IN THE COURTROOM WHEN SHE WAS A WITNESS AND NOT AN OFFICER NOR THE VICTIM OF THE ALLEGED OFFENSE.

There was no error in allowing Miss Monarrez to remain in the Courtroom while excluding all other witnesses. The Court has the discretion to permit some witnesses to remain in the Courtroom while excluding others. It may except one or more witnesses from the operation of an order for exclusion. Such things lie within the discretion of the Court. (48 Cal. Jur. (2d) 356) Unless there was a patent, undeniably, prejudicial abuse of such discretion, the Trial Court's discretion must control. Such prejudicial abuse does not appear here.

II.

DEFENDANT'S CONTENTION II: THE COURT DEPRIVED DEFENDANT OF HIS LEGAL RIGHT TO THE DEFENSE OF MISTAKE OF FACT UNDER PENAL CODE SECTION 26 (Four) BY REFUSING DEFENDANT'S SUBMITTED INSTRUCTION THEREON IN THE EXACT LANGUAGE OF CALJIC INSTRUCTION No. 71-B.

Defendant's claim that he was denied his legal right to the defense of mistake of fact under Penal

Code Section 26 (4) by the refusal of defendant's submitted instruction thereon in the language of CALJIC Instruction No. 71-B is without merit.

It is true that "wilfulness" is an essential element of the crime charged. *(People* v. *Swiggy,* 69 Cal. App. 574) Here, however, defendant is arguing only on construction of the evidence. There is evidence which would belie defendant's paternity of the child. There is evidence also that supports a finding of paternity. Obviously, the jury believed the latter and so found. Of course, the jury also determined his "wilfulness" as required for the commission of the crime. This "wilfulness" could not possibly be belied by any "mistaken" belief that he had in non-intercourse. The jury must have believed he did have such intercourse. This being so, any claim he had of non-intercourse or of belief in non-intercourse could not possibly be considered a "mistake of fact" or as disproving criminal intent. *(People* v. *Fitzpatrick,* 78 Cal. App. 37)

III., IV., V.

DEFENDANT'S CONTENTION III: THE COURT PREJUDICIALLY FAILED TO INSTRUCT THE JURY AS TO THE PURPOSE OF THE TESTIMONY PERMITTED UPON DIRECT EXAMINATION OF THE OTHER CRIMES SHOWN OF STATUTORY RAPE, CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND FURNISHING LIQUOR TO A MINOR.

DEFENDANT'S CONTENTION IV: THE COURT PREJUDICIALLY FAILED TO INSTRUCT THE JURY AS TO THE PURPOSE OF THE TESTIMONY PERMITTED UPON DIRECT

EXAMINATION OF THE CRIME OF FORCIBLE RAPE AT A TIME WHEN THE CHILD COULD NOT POSSIBLY HAVE BEEN CONCEIVED UNDER THE COURT'S LIMITING PERIOD OF BETWEEN JANUARY 1, 1964 and MARCH 31, 1964.

DEFENDANT'S CONTENTION V: THE COURT PREJUDICIALLY ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE DEPUTY DISTRICT ATTORNEY ADDUCED EVIDENCE OF FORCIBLE RAPE OF THE COMPLAINING WITNESS BY THE DEFENDANT AT A TIME WHEN THE CHILD COULD NOT POSSIBLY HAVE BEEN CONCEIVED AND IN FAILING TO GIVE ANY INSTRUCTIONS AS TO THE PURPOSE OF THIS EVIDENCE.

From the "Settled Statement of Facts" in the record it appears that in the direct examination of the complaining witness, Miss Monarrez, questioning by the Assistant District Attorney did elicit answers that at the time of the 1963 Yolo County Fair defendant "laid me on the seat" and "raped me," and "tore my underpants." However, objection to this was sustained by the Court and the testimony was stricken and the jury was admonished to disregard such testimony. The testimony which was stricken and which the jury was admonished to disregard concerned a time outside the possible period of conception. It appears, however, from the "Settled Statement" that, despite the sustaining of objections on direct examination, and the admonition to the jury, defendant cross-examined the witness on this incident and elicited much of the material of which he now complains.

In view of the strength of other evidence presented in this case, and since the Court adequately admonished the jury, and even after the admonition defendant pursued the subject by questions related thereto, it cannot be said that the above testimony of Miss Monarrez was prejudicially erroneous. (See cases collected in 4 Cal. Jur. (2d)—*Appeal and Error,* Sec. 623 and 624, p. 505, et seq.)

Obviously, no instruction to the jury, apart from the admonition, was required. The Trial Court's refusal to grant defendant's motion for a new trial on grounds concerning the above was proper.

Complaint is made also of failing to instruct the jury as to the purpose of testimony of other crimes, of statutory rape, contributing to the delinquency of a minor, and furnishing liquor to a minor. It appears that the evidence complained of was properly admissible as having a bearing on and tending to prove the commission of the crime charged against defendant. An essential element here, of course, is paternity. Certainly, evidence of sexual intercourse tends to show paternity and evidence of intercourse by Miss Monarrez and defendant prior to the period concerned here (within the not remote past) tended to substantiate the occurrence of intercourse by them at the time of claimed conception. Evidence of previous intercourse is competent to show the probability of the particular act having occurred. *(Berry* v. *Chaplin,* 74 Cal. App. (2) 652; *People* v. *Brazil,* 112 Cal. App. 326)

There is nothing in the record to indicate that a limiting instruction concerning the above was requested by defendant. There is no duty on the Court, absent request, to give such an instruction *(Witkin: California Criminal Procedure,* 477, 478, 479, 492 et seq.)

VI.

DEFENDANT'S CONTENTION VI: THE COURT PREJUDICIALLY ERRED IN REFUSING THE DEFENDANT THE RIGHT TO PRESENT EVIDENCE OF THE UNCHASITY OF THE MOTHER BY CROSS-EXAMINATION AND INDEPENDENT EVIDENCE TO COUNTER THE EVIDENCE OF FORCIBLE RAPE BROUGHT OUT BY THE PROSECUTION. ALTHOUGH ALLOWING THE DEFENDANT TO TESTIFY THAT HE USED NO FORCE ON THE PROSECUTING WITNESS, SINCE THE DEFENDANT WAS ENTITLED TO COUNTER BY ALL PROPER EVIDENCE THE DENIED CONSENT OF THE PROSECUTING WITNESS TO THE CONTENTION ON HER PART THAT FORCE WAS USED.

There is no merit to this claim. The cases clearly establish that it is improper to show intercourse of the mother with other men at times other than at or about the time of conception. (8 Cal. Jur. (2d) 252) The time of possible conception was clearly established in this case.

VII.

DEFENDANT'S CONTENTION VII: THE COURT PREJUDICIALLY REFUSED DEFENSE COUNSEL THE RIGHT TO EVEN ASK QUESTIONS CONCERNING SEXUAL RELATIONS WITH MISS MONARREZ WHICH MIGHT OR MIGHT NOT HAVE INVOLVED IMPEACHMENT OF A WITNESS SUBPOENAED BY THE DEFENSE UNLESS THE DEFENSE CQULD

ASSURE THE COURT IN ADVANCE WHAT THE WITNESS' ANSWER MIGHT BE.

The "Settled Statement of Facts" disposes of this contention. There was no showing that the evidence of Dennis Smith would relate to intercourse with Miss Monarrez during the period of possible conception. Nor does it appear any where that the witness Bailey would testify as to Dennis Smith having said at any time that he had intercourse with her at a definite time, particularly during the period of possible conception. The claimed evidence on this, to the contrary, is rather general.

VIII., IX., X

DEFENDANT'S CONTENTION VIII: THE COURT PREJUDICIALLY ERRED IN REFUSING TO GRANT THE DEFENSE MOTION FOR AN ADVISORY VERDICT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR DISMISSAL FOR FAILURE TO ESTABLISH THE CORPUS DELECTI AT THE CLOSE OF THE PROSECUTION'S CASE.

DEFENDANT'S CONTENTION IX: THE COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTION TO REOPEN ON THE LAST DAY OF TRIAL TO ESTABLISH AN ELEMENT OF THE CORPUS DELECTI WHICH THE COURT HAD PREVIOUSLY RULED WAS ALREADY PRESENT.

DEFENDANT'S CONTENTION X: THERE IS NO EVIDENCE IN THE RECORD OF THE ESTABLISHMENT OF A NECESSARY ELEMENT OF THE CORPUS DELECTI, NAMELY THAT

THE MEDICAL ATTENDANCE WHICH THE DEFENDANT ALLEGEDLY FAILED TO FURNISH WAS IN FACT NECESSARY FOR THE UNBORN CHILD AS DISTINGUISHED FROM THE MOTHER.

The corpus delecti was established by the prosecution. Whether this was done before the prosecution was permitted to reopen its case in chief or after is really not material. However, it does appear that all necessary elements were established prior to the reopening. The reopening, of course, was entirely within the discretion of the Trial Court. Defendant ignores the fact that the Court could, in its discretion, allow the prosecution's case in chief to be reopened to buttress its case instead of for supplying missing elements of the corpus delecti.

The complaint before the Court, and upon which trial was held, charged that defendant "did wilfully and unlawfully omit without lawful excuse to furnish medical attendance to Helen Monarrez, and the unborn child," a violation of Penal Code Section 270. Within the provisions of Penal Code Sections 959 and 960 there seems to have been no prejudice to defendant in the form of the complaint. The jury was instructed on Section 270 insofar as it relates to the child. It is true that this instruction concerns a much broader field than mere lack of "medical attention" to the infant. However, the record supports a finding that there was no furnishing of medical attention by defendant to the child at the time concerned. As a matter of fact, this is strengthened by the showing that there was no furnishing at the time of delivery as well, both of

which services were attested to by Dr. Sobeck. The failure of defendant to furnish such medical attendance was testified to by Miss Monarrez.

Wilfulness and lack of lawful excuse are presumed from the evidence of omission by defendant to furnish the medical attendance. (Penal Code Sec. 270)

The establishment of paternity has already been discussed.

The evidence, fairly construed, does show that the corpus delecti was established.

XI.

DEFENDANT'S CONTENTION XI: THE COURT PREJUDICALLY ERRED IN FAILING TO ALLOW THE DEFENSE TO ESTABLISH EVIDENCE SHOWN BY DEFENDANT'S OFFERS OF PROOF.

The various offers of proof made by defendant (in addition to those already considered) have been reviewed. The Court had restricted (properly) the evidence of intercourse by Miss Monarrez with others than defendant to a definite period. The law on this has been discussed previously. The offers of proof of intercourse of others with her at other times were properly rejected.

The offer of proof concerning testimony of one Dennis Smith and of other witnesses concerning statements of said Smith was properly rejected. The crux of this offer has been discussed hereinabove.

There was no prejudice or error in the ruling of the Court on the offer of proof concerning the testimony of Bill D. White.

XII.

DEFENDANT'S CONTENTION XII: THE DEPUTY DISTRICT ATTORNEY WAS GUILTY OF PREJUDICIAL MISCONDUCT BEFORE THE JURY IN MISSTATING THE EVIDENCE IN ARGUMENT, IN REPEATEDLY PERSONALLY ATTACKING DEFENSE COUNSEL, ASKING DEGRADING AND IRRELEVENT QUESTIONS OF THE DEFENDANT ON CROSS EXAMINATION, IN BRINGING OUT EVIDENCE OF OTHER IRRELEVENT CRIMES OF THE DEFENDANT WITHOUT STATED PURPOSE OR SUBMITTED LIMITING INSTRUCTION, IN ARGUING THE NECESSITY OF SUPPORT PAYMENTS TO THE JURY, IN ARGUING AGE DISCREPANCY, MISMATCH, ANIMAL ACT, ANIMAL PASSION, AN ACT OF PURE LUST, NO LOVE ON THE PART OF THE DEFENDANT AND SIMILAR CHARACTERIZATION, IN IMPROPERLY ASKING HIS OWN WITNESSES IF THEY WERE TELLING THE TRUTH AND IF THEY KNEW THE MEANING OF THE OATH.

The actions and statements of the Assistant District Attorney in this case were far from exemplary. However, while not condoning them, the Court cannot say that any one of them, or the aggregate of them, constituted prejudicial error. Undoubtedly, they were vexatious. The Trial Court exercised proper discretion in the handling of these matters when objection was made thereto. The vexation caused and the poor impression that such matters may have had on the jury, are more than offset by the strength of the case against defendant.

XIII.

DEFENDANT'S CONTENTION XIII: THE COMPLAINT IMPROPERLY CHARGES AND THE VERDICT IMPROPERLY FINDS THE DEFENDANT GUILTY OF FAILING TO PROVIDE FOR HELEN MONARREZ WHICH IS NOT A CRIME IN THE STATE OF CALIFORNIA.

The complaint herein charges non-support of "Helen Monarrez, and the unborn child." The jury was instructed only on non-support of the child. The whole trial proceeded on that basis. There seemed to be no doubt about that—at any time during the trial, while evidence on the paternity issue, on the lack of furnishing of medical attendance, or on other matters was presented. The verdict is simply of guilt of violation of Penal Code Sec. 270.

A fair degree of liberality in pleading is permitted under Penal Code Sec. 959 and 960. No substantial right of defendant was infringed.

See: Penal Code Sec. 956, 957, 959, 960. In re *Messner,* 30 Cal. App. (2) 290.

XIV.

DEFENDANT'S CONTENTION XIV: THE COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR A NEW TRIAL UPON THE ABOVE GROUNDS AND UPON THE AFFIDAVIT OF LESLIE C. CALDWELL, JR., AS TO NEWLY-DISCOVERED EVIDENCE WHICH COULD NOT, WITH DUE DILIGENCE, HAVE BEEN DISCOVERED AND PRODUCED BY THE DEFENDANT UPON TRIAL AND WHICH IS

MATERIAL TO THE DEFENDANT IN THAT IT INVOLVED A DIRECT ADMISSION BY THE PROSECUTING WITNESS THAT SOMEONE ELSE IS THE FATHER OF THE CHILD IN QUESTION.

In the absence of abuse, the Court must abide by the discretion of the Trial Court in refusing to grant a new trial upon the ground of newly discovered evidence. There appears to have been no abuse of discretion here sufficient to hold the Trial Court in error. At the best, insofar as it might be relevant, the new evidence would only have heightened conflicts already in the record or have been cumulative of evidence already adduced.

There appears to be no merit in any of the grounds specified as being relied upon by appellant on this appeal. (Page 1, line 21 to Page 2, line 1, of Defendant's Statement on Appeal.) Accordingly, the judgment of the Trial Court is affirmed.

Dated: November 29, 1965.

James C. McDermott
Judge of the Superior Court

APPENDIX B

CALIFORNIA PENAL CODE

§ 270. [Omission to provide: Liability of father: Grade of offense: Punishment: Construction of statute: Proof of wilfulness: Proof that father outside state: Liability of mother: Application of section.] A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. If the father, during such violation, remains out of the State for 30 days, or if he fails or refuses to comply with the order of a court of competent jurisdiction requiring him to make any provision for the maintenance, support, medical treatment or other remedial care of such minor child and remains out of the State for 10 days without doing so, he is guilty of a felony. This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child nor because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so. [*Proof of wilfulness.*] Proof of abandonment or desertion of a child by such father, or the omission by

such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is wilful and without lawful excuse.

[*Proof that father outside State.*] Proof of abandonment or desertion of a child by such father or omission by such father to furnish such food, shelter, clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the State.

[*Liability of mother.*] In the event that the father of either a legitimate or illegitimate minor child is dead or for any other reason whatsoever fails to furnish the necessary food, clothing, shelter or medical attendance or other remedial care for his minor child, the mother of said child shall become subject to the provisions of this section and be criminally liable for the support of said minor child during the period of failure on the part of the father to the same extent and in the same manner as the father.

[*Application of section.*] The provisions of this section are applicable whether the parents of such child are married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned. [Enacted 1872; Am. Stats. 1905, p. 758; Stats. 1909, p. 258; Stats. 1915, p. 572; Stats. 1917, p. 252; Stats. 1921, p. 1723; Stats. 1923, p. 592; Stats, 1925, p. 544; Stats. 1931, p. 1438; Stats, 1939, p. 2783; Stats. 1955, ch. 753, § 1; Stats. 1957, ch. 139, § 32, ch. 1855, § 1.]

CALIFORNIA PENAL CODE

§ 1471. Transfer to district court of appeal; grounds; exception; power of reviewing court

A district court of appeal may order any case on appeal within the original jurisdiction of the municipal and justice courts in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the district court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein.

A court to which any such case is transferred shall have similar power to review any matter and make orders and judgments as the superior court by statute would have in such case, except as otherwise expressly provided and except that if the case was tried anew in the superior court, the reviewing court shall have similar power to review any matter and make orders and judgments as it has by statute in a case within the original jurisdiction of the superior court. Added Stats. 1961, c. 693, p. 1935, § 18, operative Jan. 2, 1962.)

CALIFORNIA RULES OF COURT

Rule 63. Certification

(a) [Authority to make] The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court

of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

(b) [Application for certification] Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. If there was a trial in the superior court the application shall be served and filed at least 10 days before expiration of the time for certification. Any other party may serve and file an opposition within five days after the filing of the application. No hearing shall be held on the application and the failure of the court to certify the case shall be deemed a denial of the application.

(c) [Time] The certification of a case in which there is no trial in the superior court shall be filed with the clerk of that court at any time after the record on appeal and the briefs, if any, are filed in

the superior court and not later than 10 days after the judgment on appeal becomes final as to that court. The certification of a case in which there was a trial in the superior court shall be filed within 30 days after entry of the judgment or 15 days after service of written notice of entry of the judgment, whichever is earlier, in a civil case, or within 15 days after rendition of the judgment in a criminal case, unless the time is extended as provided in subdivision (d) of this rule.

(d) [Extension of time] The time for filing the certification of a case shall be extended by new trial proceedings or proceedings to vacate a judgment in the same manner, to the same extent, and for the same period as the time for filing notice of appeal is extended by such proceedings pursuant to rule 3 of the Rules on Appeal.

(e) [Contents] The certification shall contain a brief statement setting forth any conflict of decision (with citation of or reference to decisions creating the conflict, if there is no written opinion by the superior court) or important question of law to be settled and shall state whether there was a judgment in the superior court, and, if so, the nature and the date thereof.

(f) [Transmission] Upon the filing of the certification the clerk of the superior court shall forthwith transmit a certified copy thereof to the clerk of the District Court of Appeal and shall mail notice of such certification to each of the parties and also to the Attorney General in a criminal case.

APPENDIX C

IN THE JUSTICE COURT OF THE WOODLAND JUDICIAL DISTRICT, COUNTY OF YOLO, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
THOMAS HARLING,
Defendant.

No. 2997
No. 2A-3676

SETTLED STATEMENT OF FACTS

Miss Monarrez was allowed to remain in the courtroom with the prosecutor, seated at the counsel table, over objection of Defense Counsel made on the morning of the second day of trial after the court had ruled that all witnesses in the case be excluded except Miss Monarrez and the defendant. The court observed Miss Monarrez cry on one occasion during the cross examination of the defendant when he testified that he did not love her, and once during her own cross examination. At other times she was restrained.

She testified in chief for the prosecution and also on the last day of trial when the prosecution was permitted to reopen his case in chief over the objection of defense counsel. Defense counsel had previously moved for a dismissal or an advisory verdict of acquittal

upon the ground that the corpus delecti was not established. Argument was made by defense counsel and the prosecutor in reply. The motions were denied. Defense counsel did request the court to specifiy the evidence in the case upon which the court relied for its ruling. The court stated that the jury had heard the testimony of all the witnesses and therefore that "it was a matter for the jury" to recall the testimony of the witnesses. The trial court then permitted the People to reopen its case to clear up any possible ambiguity regarding the question concerning Mr. Harling's failure to provide necessary food, clothing, shelter or medical attendance or other remedial care.

Miss Monarrez then testified that Mr. Harling had failed to provide any food, clothing, shelter, or medical attendance, and that he had not paid her any money.

Miss Monarrez testified on direct examination that she did not consent to the act of sexual relations on the first occasion during the Yolo County Fair in 1963. She testified that she went with the defendant in his car into the country at approximately nine or ten at night. He stopped at the Canteen and bought some beer. They started making out—"kissing". The witness then testified that he "laid me on the seat", and "raped me". Objection by defense counsel was made and sustained by the court. The next question by the prosecutor was "What did he do next?". The witness answered, "He tore my underpants". Objection was again made by defense counsel and an assignment of misconduct was made that such interrogation and evidence was highly prejudicial to the defendant and his rights in that it brought before the jury evidence of the crime of forcible rape at a time when the child

could not possibly have been conceived and was of such an inflammatory nature that a mistrial should be granted. The prosecutor in response to this objection and motion stated to the court that Miss Monarrez's testimony of "rape" came as a surprise to him and that if allowed to continue questioning the witness it would be developed that in fact no forcible rape occurred. The objection was sustained by the court. The testimony of forcible rape was ordered stricken, and the jury was admonished to disregard such testimony. The motion for a mistrial was denied. The court does not recall other crimes being enumerated in the motion for a mistrial except forcible rape. There was no further testimony on direct examination of this act of sexual relations; however, Miss Monarrez was questioned on cross examination as to the facts and circumstances of the first act of intercourse between the appellant and herself during which examination she testified that the defendant, "Ruined and tore my zipper".

Helen Monarrez further testified that the next act of sexual relations occurred on New Years Day, 1964 in Tom's car, and that it was a voluntary act on her part. She further stated that Tom had a bottle of Vodka in his car.

She testified that the child, Jana Rosalyn Monarrez, born 11-7-64 was conceived on February 18, 1964. Tom picked her up in his car to go to the basketball game with Arbuckle in Esparto, but instead he drove into the country and parked. She testified that she told the defendant that she loved him, to which he replied that "I should prove it". They had sexual relations after which they had an argument and she stated that she hit him in the nose causing his nose to bleed, and told

the defendant that if she got pregnant, "I'd keep the baby". She testified that no contraceptives were used.

Miss Monarrez testified that the last act of sexual relations with Tom Harling occurred on the Saturday night before Easter Sunday, and that the baby's father was Tom Harling.

Miss Monarrez further testified that she went to Dr. Sobeck of Davis with reference to her pregnancy and on cross examination that she had seen him once prior to filing the complaint. She testified that previously she had visited Dr. Loder in Esparto because she was nervous and rundown. Defense counsel made no objections to testimony of Miss Monarrez relating to the defendant's purchasing or use of alcoholic beverages.

On cross examination defense counsel with reference to the meeting at the county fair asked the witness Miss Monarrez, if it were not true that she told Tom, "I wish you'd rape me." The witness denied saying this after an objection by the prosecutor to the question was overruled. Miss Monarrez thereafter was cross-examined as to what alcoholic beverages were consumed by Tom Harling and her after leaving the fair grounds. She testified that Tom purchased Olympia beer in bottles, that she opened the bottles and drank some but not much because she didn't like it. She further testified on cross-examination that she was wearing white levis, cut off at the knees; that her undergarments were torn; that she hid her clothing after she got home, and that she told no one of the incident.

The defense then made the following offer of proof outside the presence of the jury:

1. That Jerry Harling would testify that he had relations with Helen Monarrez before his brother, the

defendant, but that this was not within the period allowed by the court.

2. That Mike Kolb would testify that he had sexual relations with Helen Monarrez but not within the period allowed by the court. Both the Kolb and Jerry Harling testimony were as to times prior to the birth of the child in question.

3. That Dennis Smith had advised defense counsel that he had had relations with Miss Monarrez but not as to the date thereof. That on the eve of trial the said Dennis Smith had called defense counsel advising him that he, Dennis Smith, planned to repudiate what he had formerly stated as to sexual relationship and would testify that he had not had relations at all. That defense counsel had stated that he planned to call him to the witness stand to obtain his testimony under oath and that he assumed that he, Dennis Smith, would tell the truth.

4. That the defense had all three of the above witnesses under subpoena and, in addition, a witness named LeRoy Bailey who had heard the said Dennis Smith make an admission that he (Dennis Smith) had had relations with Helen Monarrez "quite recently" before whe announced that she was pregnant but that "you have to watch out, it has the crabs."

5. It was stipulated that the above offer of proof was properly made and that the witnesses need not be sworn and asked the questions.

The defense urged the admissibility of the above evidence upon the grounds that if other acts of intercourse with the defendant at times when the child could not possibly have been conceived were probative to show probable intercourse with the defendant when the child was in fact conceived, that then other acts of intercourse with other men were just as probative to

show that they might be the father during the period of conception. The defense urged that it was hightly prejudicial to allow evidence of the other acts with the defendant as probative to the main charge when they could not possible yield the pregnancy in question but to preclude acts with other men during the same interim.

The defense further urged that since the prosecution had brought in evidence of forcible rape and opened up this inquiry that the defense should at least be allowed to neutralize this inflammatory and prejudicial testimony as to an episode entirely collateral to the act of conception which Miss Monarrez contended yielded her pregnancy by proper testimony as to her chastity as permitted in cases of forcible rape and any other proper impeachment.

The court sustained the prosecutor's objections to all of the above testimony. The defense was permitted to allow the defendant to deny any force. The court ruled that evidence as to acts of sexual relations with Miss Monarrez was limited to the period between January 1, 1964 and March 31, 1964. Defense counsel was limited to making inquiry concerning other sexual activities on the part of Miss Monarrez unless the defense was prepared to prove by way of impeaching evidence in the event of a denial that she did in fact have relations during the period of possible conception. The court had previously ruled that evidence of forcible rape, be striken from the record. Defense counsel did make reference to forcible rape at times throughout the trial. The court on several occasions admonished the jury that they were not to consider evidence of other crimes.

Miss Monarrez testified that she had been out on dates with the following boys: Jerry Harling, Ron Giovanetti, Mike Coulter, Jim Wertman, Dennis Smith, Walter Olson, Brian Crutcher, and Mike Joy. She denied being out with the following boys: Mike Kolb, Gary Easterly, Art Tunstall, Jimmy Moore, Terry Holland, John Rademaker, Dennis White, Cliff White, Gary Warren, Dale Lang, Eddie James, Brad Tillinghouse, Johnny Perez, and John Travis.

Miss Monarrez further testified under cross-examination that on February 18, 1964, after Tom had picked her up that he purchased a bottle of 100 proof alcoholic beverage at Lindberg's bar, that they parked for one and one-half hours the other side of Capay and that they had sexual relations. During and argument she hit Tom in the nose causing his nose to bleed. She drove the car thereafter because Tom was drunk and she picked up Judy Perrazo and Peg Weatherford and went to her home. Martin Monarrez and Frankie Creamer came to her home later.

The witness testified on both direct and cross examination that she loved the defendant and that she and Tom had discussed marriage on several occasions. The court does not recall any objections being made by defense counsel on direct examination to this line of questioning.

Under cross-examination she denied telling LeRoy Bailey on March 22, 1965, that "I would marry Tom if he came back to me. Tom is a good lover and good in bed."

Objections were made by the prosecutor during cross-examination with reference to the number of boys referred to. That such questions were designed to lay the foundation for impeachment and that there

should be some limit to the number of persons referred to. The objections were overruled by the court on each occasion.

Witness Judy Perrazo testified, after being called by the prosecution, that the defendant was with Miss Monarrez on the night of February 18, 1964, and that she saw appellant in the home of Miss Monarrez that evening. On cross-examination she was asked whether or not she was a friend of Helen Monarrez and nothing more. She answered that she was. Thereafter, she was excused and stepped down from the stand. As she was about to leave the courtroom the prosecutor asked her to again resume the stand and asked her, over objection, if she was "telling the truth?" and if she "knew the meaning of the oath?" Objection was made by defense counsel to this line of questioning. The objection was sustained as to the question of "telling the truth" but the witness was permitted to answer whether "she knew the meaning of an oath".

Dr. Frederick Sobeck of Davis testified that he examined Helen Monarrez 9-2-64 in his office with regard to her pregnancy. He testified that she was seven months pregnant, based on the size of the uterus which was 20 centimeters, or 8 inches. Based on his examination and the statement of Helen that her last menstrual period was 1-28-64, he predicted that the child would be born 11-2-64. He further testified that he delivered the child 11-7-64.

The court does not recall any direct testimony from Dr. Sobeck as to medical "needs" of the unborn child as distinguished from the "mother".

Peggy Weddle was called by the people and testified that she saw Tom Harling after the basketball game on February 18, 1964, at Miss Monarrez's home. She

testified that Tom had a swollen nose and that Tom and Helen were "acting up".

Miss Yvonne Christine Haley testified for the people that she was present at the apartment of LeRoy Bailey in March or April of 1964 when both Helen and Tom were present. She further testified that Helen told her "We're getting married". She was recalled by defense counsel and testified that Helen had Jerry Harling's ring and that she had gone with him.

Witness Martin Monarrez testified that the defendant stated to him on March 18, 1964, "I hate to tell you this. I think I've got your sister pregnant. Do you have any objection to my being your brother-in-law?"

Appellant admitted this statement and said that he thought he was the father of the child until he started to count back and figured out when the last time was that he had intercourse with Miss Monarrez. This was between November 20th and 30th of 1963, according to the defendant, and Miss Monarrez did not tell him at first how far along she was so he figured it could be him. When he did find out, he denied the child was his at all times. He testified that he was ill in bed at the time of the alleged conception on February 18, 1964 and got up that day only to see the doctor.

In his opening argument the prosecutor contended that Martin Monarrez testified to seeing Tom Harling in his home on February 18, 1964, following a basketball game. Defense counsel in his argument contended that there was no such testimony given. Objection was made by the prosecutor. The court advised the jury that this was argumentative, that they had heard the testimony of all the witnesses,

and that it was a matter for them to recall the testimony of each witness. The court has no notes that Mr. Monarrez testified as indicated by the prosecutor.

Dr. John Loofbourow, M.D. testified that defendant was in his office on that date with acute virus with pleurisy and on that date was "markedly improved" but had cyclical relapses both before and after that date.

On cross-examination of the defendant the prosecutor asked Mr. Harling whether he loved Miss Monarrez, how he felt towards her during the acts of sexual relations, and whether or not that he told her at any time that he loved her. Mr. Harling testified that at no time had he loved her. He did admit that the subject of marriage had been discussed with Helen. It was during this cross-examination of Mr. Harling that the prosecutor used the words "pure lust", "pure animal act" and "animal gratification". Objection to this questioning was made by defense counsel and sustained by the court. No prior objection had been made by defense counsel which had been overruled.

Bill D. White testified that Helen Monarrez told him that Tom used force upon her during the first act of sexual relations. The defense claimed surprise as to this testimony and sought to impeach Mr. White as a defense witness upon the ground that Mr. White had told LeRoy Bailey that Miss Monarrez had voluntarily consented to intercourse upon each occasion when she was with the defendant. An offer of proof was made by the defense counsel concerning the impeaching testimony and the claim of surprise. The court denied the offer of proof. The court denied defense the right to proceed with evidence as to forcible rape. The court does not recall denying de-

fense the right to call witness Bailey who did testify later.

Neal F. Henock, personnel director of Kordite testified that the defendant was not at work on the date in question, February 18, 1964 and was off work from February 7, 1964, through March 23, 1964 when he returned.

Mrs. Thelma Harling testified that she took care of defendant while he was ill during the above period and that he was at home on February 18, 1964 and did not leave the house except to go to the doctor's office. She further testified that the doctor told Tom to stay in bed and that he did stay in bed until March 6th during which time she served him meals in bed, because of his weakness.

The court does not recall Mrs. Harling's exact testimony to be "that her son was so weak that all he could do was lift his head from the pillow". The prosecutor in his argument to the jury used this sentence substantially as set forth prefaced by "Mrs. Harling would have you believe".

Orvis LeRoy Bailey testified to two parties held in his apartment when his wife was gone at which time Miss Monarrez was in attendance. One was after the pregnancy of Miss Monarrez and one was before. Witness Bailey testified that Miss Monarrez was present along with Dennis Smith at the party after the conception, about Easter of 1964. The witness did not testify that Miss Monarrez and witness Smith were at the party on a date together. An offer of proof was made by defense counsel that it was at this party that witness Bailey heard witness Smith admit to sexual relations with the complaining witness within a short time before.

Objection was made by the prosecutor to testimony of any other acts of sexual relations being presented to the jury, except during the period of concepton.

The court recalls that during argument between counsel following this objection before the jury, the prosecutor used some of the following phrases: That the defense counsel was "highly unethical", "highly unprofessional", "grossly unprofessional", "guilty of unprofessional conduct", "deliberately trying to get before this jury questions that he knows are even improper to ask", "I don't know whether I can assign misconduct to defendant's counsel or not" and "I assign defense counsel as being guilty of prejudicial misconduct."

The prosecutor made the above phrases throughout the trial during objections to defense questions or statements. The court on several occasions after heated exchanges between counsel admonished the jury that argument and statements of counsel were not evidence and that they were to consider only the evidence presented to them as to the crime charged.

Dennis Smith testified for the people. He testified that he saw Helen and Tom together about the last of March or April at LeRoy Bailey's apartment. He was not with Helen Monarrez. LeRoy Bailey was present.

I, Clarence Walden, Judge of the Justice Court, Woodland Judicial District, hereby certify that the above is a true and correct statement of the evidence and proceedings in the trial court in the above entitled action.

DATED: June 29, 1965

CLARENCE WALDEN

JUDGE

Engrossed this 28th day of June, 1965 but to include additionally all of appellant's specifications of grounds on appeal in accordance with Rule 7 and as set forth in Appellant's STATEMENT ON APPEAL.

HARRY A. ACKLEY

Attorney for Appelant

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